UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLYDE EDWIN SEIDEL,
Petitioner-Appellee,

v.

W.A. MERKLE,
Respondent-Appellant.

No. 94-1621 SI

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Filed March 27, 1997

Petitioner Clyde Seidel, a state prisoner, filed an application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 alleging ineffective assistance of his trial counsel on March 10, 1994. Having carefully considered the papers submitted by the parties and the findings of fact and law by Chief Magistrate Judge F. Steele Langford, the Court hereby GRANTS the petition for a Writ of Habeas Corpus.

BACKGROUND

Petitioner Clyde Seidel stabbed a man in the course of a drunken fight; the victim, Jade Bucholz, subsequently died. Seidel was charged by the Humboldt County District Attorney with one count of murder in violation of California Penal Code § 187 on July 11, 1990. Seidel was convicted by a jury of second degree murder in Humboldt County Superior Court and on November 22, 1991, was sentenced to sixteen years to life in state prison, including a one-year enhancement for use of a deadly weapon.

The trial court instructed the jury on: (1) voluntary manslaughter based on the heat of passion or an honest but unreasonable belief in self-defense, (2) involuntary manslaughter, and (3) pure self-defense. However, petitioner's counsel only made arguments for pure self-defense. Petitioner did not take the stand to testify on his own behalf.[1]

After the verdict, trial counsel petitioned the trial court for a new trial or in the alternative a modification of his conviction to a lesser crime. The trial court denied those motions. Seidel then requested and was assigned new counsel based on his claim of ineffective representation. Under advice of new counsel, Seidel filed a writ of habeas corpus and alternatively for a new trial or reduction of sentence. Seidel argued that he was deprived of a fair trial through the loss of a meritorious defense. The trial court granted petitioner's motion for appointment of a psychologist, Dr. Koller, to examine him. Dr. Koller's report of his examination of petitioner revealed that Seidel suffered from several symptoms of Post Traumatic Stress Disorder ("PTSD") due to his combat

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1. In post-trial declarations, several members of the jury indicated that they did in fact consider Seidel's decision not to testify as evidence of his guilt. *See* Lynch Order at 3.

experiences in Vietnam as well as other personal trauma.[2/] Petitioner also suffers from organic brain damage.

The trial court denied the habeas petition and the motion for a new trial. The State Court of Appeal affirmed Seidel's conviction on April 19, 1993. On July 21, 1993, the California Supreme Court denied review of petitioner's claims. Seidel subsequently filed a petition for Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. In an order dated February 2, 1995, District Judge Eugene F. Lynch found that petitioner had stated a cognizable claim of ineffective assistance of counsel and issued an Order to Show Cause why a writ should not issue. On November 15, 1996, an evidentiary hearing on petitioner's allegations of ineffective assistance of counsel was held by Chief Magistrate Judge F. Steele Langford. Judge Langford issued his findings of fact and conclusions of law on December 27, 1996.

DISCUSSION

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance but *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (emphasis added). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*

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2. Dr. Koller's report also states, "It has been established that Mr. Seidel was well aware of the aggressive nature of the victim. It is thus quite possible that the combination of situational factors, Mr. Seidel's PTSD, and his organic brain damage, helped create an excessive fear for his well-being and subsequent impulsive, poorly thought out over-reaction with the knife."

A. Deficient Performance by Counsel

First, the defendant must demonstrate that counsel's performance was deficient. In particular, the defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 687. The defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. Judicial scrutiny of counsel's performance must be highly deferential, however, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*; *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). A defendant can make out a claim of ineffective assistance of counsel only by pointing to specific errors made by trial counsel. *United States v Cronic*, 466 U.S. 648, 666 (1984); *Smith v. Ylst*, 826 F.2d at 872, 875 (1987).

A claim of negligence in conducting pretrial investigation can form the basis for a claim of ineffective assistance. *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983); *Hines v. Enomoto*, 658 F.2d 667, 676 (9th Cir. 1981). Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. *See Sanders*, 21 F.3d at 1457 (failure to investigate which led to an uninformed decision not to call witness who had admitted to committing crime was not a strategic decision); *United States v. Burrows*, 872 F.2d 915, 918 (9th Cir. 1989) (counsel's performance deficient where counsel failed to investigate possibility of mental illness defense); *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) (failure to investigate possibility of mental impairment cannot be construed as trial tactic where counsel failed to review relevant documents); *Deutscher v. Whitley*, 946 F.2d 1443 (9th Cir. 1991) (counsel's failure to challenge aggravating factors and to present mitigating evidence for client who suffered from pathological intoxication and organic brain damage resulted in fundamental miscarriage of justice). The failure to investigate a defense may not be ineffective assistance where it was due to the defendant's failure to inform the attorney of relevant facts or the defendant's insistence on a

particular course of action. *See Langford v. Day*, No. 95-99001, slip op. 15999, 16013-16 (9th Cir. Dec. 24, 1996).

In the instant case, trial counsel was aware of petitioner's mental state from his interview with Seidel[3] and was alerted to significant facts which should have caused trial counsel to investigate a possible defense related to petitioner's mental health.[4] Petitioner reported his nightmares about his Vietnam experience to trial counsel. In addition, it was not petitioner's duty to envision possible defenses based on his PTSD symptoms.

A difference of opinion as to trial tactics does not constitute denial of effective assistance, *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir.), *cert. denied sub. nom.*, *Dondich v. United States*, 454 U.S. 1127 (1981), and tactical decisions are not ineffective assistance simply because in retrospect better tactics are known to have been available. *Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. *Thompson v.*

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3. Trial counsel's own handwritten notes from an interview with petitioner on July 23, 1990 indicate that on the date of the incident petitioner stated that he attempted to walk away from the victim because he was taking medication from the V.A. hospital and gets "anger fits and blacks out." Counsel's notes also indicate that counsel was aware that the mental health department was going to get petitioner's medications for him locally while he was in custody.

4. Records existed at the time of trial that: (1) petitioner had been seen by a psychiatrist while awaiting trial in the Humboldt County Jail, (2) petitioner was taking medication prescribed by a psychiatrist, (3) Psychiatric Progress Notes in petitioner's jail medical record indicate that he was treated at the Roseburg V.A. hospital "for what sounds like PTSD", (4) the O.R. Bail Report prepared for petitioner's bail hearing documents prior hospitalization at the Roseburg V.A. for having "bad dreams of his Vietnam days", and (5) an entry in the jail medical record by a crisis worker refers to a prior psychiatric hospitalization.

Calderon, 86 F.3d 1509, 1515-16 (9th Cir. 1996). Nevertheless, the label of "trial strategy" does not automatically immunize an attorney's performance from Sixth Amendment challenges. *United States v. Span*, 75 F.3d 1383, 1389-90 (9th Cir. 1996).

Counsel's decision to argue only for reasonable self-defense would have been an acceptable tactical decision only if counsel had investigated petitioner's PTSD. In petitioner's case, however, counsel interviewed no witnesses regarding Seidel's mental history or state of mind, did no research or investigation regarding a mental defense in general or PTSD in particular, and made no argument for voluntary manslaughter or imperfect self-defense. Counsel was not even in a position to make a strategic decision, as he had done no investigation. Counsel's failure to not present evidence of petitioner's PTSD or mental health background was unreasonable in light of the information that was available to counsel at the time of trial. Therefore, the Court must construe counsel's decision not to argue for manslaughter or imperfect self-defense not as a tactical decision but instead as an error of constitutional dimension.

B. Prejudice

Second, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, i.e., a trial whose result is reliable. *Strickland*, 466 U.S. at 688. The test for prejudice is not outcome-determinative. The defendant need not show that the deficient conduct more likely than not altered the outcome of the case. *Id.* at 693. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

In the instant case, the jury found that petitioner's use of a knife provided the malice necessary to find the petitioner guilty of second degree murder. A defense of imperfect self-defense based on the facts of the case, coupled with petitioner's mental

state at the time of the fight, the PTSD symptoms, and the organic brain damage would have eliminated the element of malice. Because counsel failed to call any experts or the petitioner to testify about petitioner's medical history meant that there was no evidence to support the jury instructions for voluntary or involuntary manslaughter. There was simply no evidence presented to the jury that Seidel acted in an honest but unreasonable manner to support a verdict of manslaughter. There is a reasonable probability, therefore, that this evidence would have resulted in a conviction of manslaughter. This court finds that there is a reasonable probability that the outcome of petitioner's trial would have been different had the jury known of his PTSD. Accordingly, petitioner has shown the element of prejudice necessary to succeed on a claim for ineffective assistance of trial counsel.

Counsel's failure to pursue any investigation into Seidel's psychiatric background and subsequent failure to present any evidence to the jury regarding his mental health in support of a finding of manslaughter denied petitioner effective assistance of counsel. This court finds that but for the conduct of petitioner's trial counsel, the outcome of Seidel's trial would have been different. Therefore, Seidel's petition for a Writ of Habeas Corpus is granted.

CONCLUSION

For the aforementioned reasons, and for good cause shown, the petition for a Writ of Habeas Corpus is hereby GRANTED. Respondent is ordered to release petitioner within 60 days of this order. During that time, Humboldt County may elect to re-try Seidel.

IT IS SO ORDERED.

Dated: March 26, 1997

SUSAN ILLSTON
United States District Judge